



Report of the  
Eyewitness Identification and Custodial  
Interrogation Study Committee

Submitted to the  
House and Senate  
Committee on Judiciary

December 14, 2007

## Report of the Eyewitness Identification and Custodial Interrogation Study Committee

Act 60 of the 2007 Legislature allows one convicted of a felony to file a petition requesting DNA testing of any evidence that may contain DNA evidence obtained during the investigation or prosecution of that crime. The Act also permits one who was wrongfully convicted and imprisoned for a crime the person was exonerated for, on the basis of DNA evidence, to bring an action against the state for compensation. In addition, Act 60 created two different study committees; one was the Preservation of Evidence Study Committee, and the other was the Eyewitness Identification and Custodial Interrogations Study Committee. This is the report of the Eyewitness Identification and Custodial Interrogation Study Committee.

### I. The Committee Members.

The Committee was comprised of the following people:

Jane Woodruff, the Executive Director of the Department of State's Attorneys and Sheriffs' Departments, Chair;  
Attorney General's Office designee, John Treadwell;  
Vermont Association of Chiefs of Police designee, Chief Tom Hanley, Middlebury Police Department;  
Captain of the Bureau of Criminal Investigations of the Vermont State Police, Captain Edward Ledo;  
Designee from the Vermont Criminal Justice Training Council, John Gonyea;  
Commissioner of Public Safety or designee, Commissioner Kerry Sleeper;  
Defender General, Matthew Valerio;  
Defender General's Investigator, Guy Paradee;  
Defender General Designee, Anna Saxman;  
Vermont Sheriffs' Association designee, Sheriff Sam Hill, Washington County;  
Center for Crime Victim Services designee, Jennifer Poehlmann; and  
Vermont Bar Association designee, Robert Paolini.

The Committee met four times to discuss the issues presented in the charge. Those meetings were held on July 24, September 18, October 17, and November 29, 2007. The Committee took testimony from Rebecca Brown and her assistant, who are representatives from the Innocence Project out of the Cardozo Law School in New York City. This testimony occurred at the September 18, 2007 meeting. Rebecca Brown provided the Committee with materials, which were considered in analyzing the issues put before the Committee.

### II. Charge of the Committee

#### Sec. 3. EYEWITNESS IDENTIFICATION AND CUSTODIAL INTERROGATION RECORDING STUDY COMMITTEE

- (a) A committee is established for the purpose of studying issues related to the best practices regarding eyewitness identification procedures and audio and audiovisual recording of custodial interrogations. The committee shall:
- (1) Study and analyze federal and state models and develop best practices regarding:
    - a. Audio and audiovisual recording of any custodial interrogations of suspects during the course of felony investigations; and
    - b. Eyewitness identification procedures for conducting photo lineups and live lineups.
  - (2) Study current statewide policies regarding eyewitness identification procedures for conducting photo lineups and live lineups and audio and audio-visual recording of custodial interrogations, and whether statewide policies on these issues should be adopted.
  - (3) Study current policies in local jurisdictions regarding eyewitness identification procedures for conducting photo lineups and live lineups and audio and audiovisual recording of custodial interrogations, and whether these policies are consistent with one another and with relevant statewide policies.
- (c) The committee shall have the assistance and cooperation of all state and local agencies and departments. The committee shall consult with the Innocence Project and with the law enforcement advisory board. The department of public safety shall provide professional and administrative support for the committee.
- (e) The committee shall report its findings and recommendations, including proposals for legislative action, to the senate and house committees on judiciary no later than December 15, 2007 whereupon the committee shall cease to exist.

### III. Materials Reviewed

To assist the Committee in analyzing the issues presented by the Legislature, the following materials were reviewed and are attached as Appendix I.

- Text of S.6
- Vermont Criminal Justice Training Council Handbook
- Minutes of Meeting
- U.S. Department of Justice: Post-conviction DNA Testing: Recommendations for Handling Requests
- American Bar Association: Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures
- International Association of Chiefs of Police: Electronic Recording of Interrogations and Confessions
- A Lawyer's Guide to the Chicago Police Department's Electronic Recording of Interrogations

- California Commission on the Fair Administration of Justice: Report and Recommendations Regarding Eye Witness Identification Procedures
- California Commission on the Fair Administration of Justice: Tentative Recommendations Re: False Confessions
- Maine General Order: Recording of Suspects in Serious Crimes and the Preservation of Notes and Records
- Massachusetts State Police General Order: Guidelines for Electronic Recording of Interrogations
- Supreme Court of New Jersey: Report of the Special Committee on the Recordation of Custodial Interrogations
- Northampton Police Department: Eyewitness Identification Procedure
- U.S. Department of Justice: Line-Up Protocol
- U.S. Department of Justice: Eyewitness Evidence, A Guide for Law Enforcement
- State of Wisconsin: Model Policy and Procedure for Eyewitness Identification
- Wisconsin Department of Justice: Electronic Recording in Custodial Interviews (Attorney General Peg Lautenschlager)
- Innocence Project: Model Legislation, 2007 State Legislative Sessions, An Act to Improve the Accuracy of Eyewitness Identifications (Benjamin N. Cardozo School of Law, Yeshiva University)
- Innocence Project: Model Legislation, 2007 State Legislative Sessions, An Act Directing the Electronic Recording of Custodial Interrogations (Benjamin N. Cardozo School of Law, Yeshiva University)
- Suffolk County: Report of the Task Force on Eyewitness Evidence
- Northwestern University School of Law: Center on Wrongful Convictions, Police Experiences with Recording Custodial Interrogations (Thomas P. Sullivan)
- Innocence Project: False Confessions and Recording of Custodial Interrogations (Benjamin N. Cardozo School of Law, Yeshiva University)
- Maryland: House Bill 103; Public Safety – Eyewitness Identification – Written Policies
- General Assembly of North Carolina: House Bill 1625; An Act to Enact the Eyewitness Identification Reform Act
- Journal of Forensic Identification, 2 Articles-Observing and Describing the Human Face and The Horrors of Visual Identification
- New Jersey Report
- National Institute of Justice: Police Lineups: Making Eyewitness Identification More Reliable
- National District Attorneys Association Policy on Electronic Recording of Statements
- North Carolina Law 2007-434
- Nebraska Legislation
- Burlington Police Department Letter

#### IV. Custodial Interrogations

1. The Committee recommends that custodial interrogations in felony investigations, wherever practicable, should be videotaped and audiotaped.
2. The Committee also recommends that custodial interrogations in felony investigations, wherever at all possible, should be, at a minimum, audiotaped. This best practice takes into account the reality that a person of interest in an investigation may have to be interviewed out in the field.
3. The Committee realizes that not all of the law enforcement agencies in Vermont currently have videotaping and audiotaping capabilities. A funding source needs to be found to enable all agencies to have and maintain audio and audio-videotaping capacity for custodial interrogations in felony investigations.<sup>1</sup>

#### V. Eyewitness Identification Procedures for Photo and Live Line Ups

**“Eyewitnesses frequently play a vital role in uncovering the truth about a crime. The evidence they provide can be critical in identifying, charging, and ultimately convicting suspected criminals. That is why it is absolutely essential that eyewitness evidence be accurate and reliable. One way of ensuring we, as investigators, obtain the most accurate and reliable evidence from eyewitnesses is to follow sound protocols in our investigations.**

**Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory. This issue has been at the heart of a growing body of research in the field of eyewitness identification over the past decade. The National Institute of Justice convened a technical working group of law enforcement and legal practitioners, together with these researchers, to explore the development of improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system.”**

**Janet Reno**  
**Former U.S. Attorney General**  
1999 Introduction to USDOJ  
Guidelines for Law Enforcement  
Officers

At the outset, it was clear to the Committee, over the course of our study, that in Vermont photo line-ups are used very *infrequently*. In fact, they occur only in 1% of the cases in Vermont, if that often. Line-ups are used even less frequently.

---

<sup>1</sup> See letter from Deputy Chief Michael Shirling, Burlington Police Department, 11/14/2007 Appendix.

Thus, it must be stressed that photo lineups, however they are employed, are only one tool that law enforcement uses in their investigations. The Committee was pleased to find that the Vermont Police Academy teaches the best practices advocated by the Innocence Project with respect to how to conduct lineups to minimize the possibility of suggestiveness. Vermont is fortunate to have one police academy where all our full-time law enforcement officers who complete the basic training are trained. Thus, there is a common base of knowledge about these best practices. Studies have indicated that cross-racial mis-identification is an area of particular concern. As Vermont becomes more diverse, eyewitness identification procedures will become important. To that end, the Committee was pleased to learn the Vermont Police Academy is already training on these issues, e.g., hate crimes, people who do not look like you and cultural diversity so that the academy is proactive in their training of Vermont law enforcement personnel.

The following methods are taught at the Vermont Police Academy.

### **"Photo line-ups"**

As with all line-ups it is recommended that the officer minimize the suggestibility of the lineup. In other words, it is recommended that the lineup contain "similar" photos. For example each photo should have similar skin color, hair color, facial hair, background color, jewelry, etc., and each photo should be the same shape and size. It is okay to include six to eight photos on the same page, but another way to minimize suggestibility is to do the line-up in book form (i.e. - one photo per page, and still being aware of features in the photograph that cause the suspect to stand out from the other photographs). The officer should not provide any input or lead the witness as to which photo to select (and the names of the people in the photographs should not be displayed on the witness copy, although a copy with the names should be retained by the investigating officer). The officer should document the level of confidence of the witness (i.e. did the witness select the suspect photo, or identify the suspect without hesitation, without a doubt, or did it take the witness a long time and was the witness unsure. The officer should always attempt to document from which angle the witness viewed the suspect and for how long (i.e. - did witness view side profile for 2 seconds, or frontal view for 30 seconds), as it may affect their ability to reliably identify the suspect. Finally, the officer should read the witness the instructions for viewing the lineup (Burlington Police Department uses a form) and have the witness initial that they understand, as well as documenting the date and time of the viewing.

### **"Show-up line-ups"**

With regards to transporting *detainees*, the general rule is that police must obtain the consent of the detainee prior to transport, or else they risk turning the detention into an arrest. An exception to this general rule is the "one-on-one-show-up." A "one-on-one-show-up" occurs when the police transport a suspect during an investigative detention without obtaining consent (when there is still not probable cause to arrest). This method of suspect identification should be

used as a last resort, and only under extenuating circumstances. The reasons for using this method of suspect identification must be clearly articulated. An example would be: Trooper locates a burglary suspect 20 minutes after crime is reported. Victim is elderly woman who is not very mobile. Trooper elects to transport suspect back to victim's residence for identification. Trooper articulates that he detained suspect based on matching description, close to crime scene, and within a short time after the crime was reported (general rule is within 4 hours). Trooper articulates that victim was alone and not mobile. Trooper articulates that he was not able to coordinate a witness drive-by identification. VERMONT HAS NOT RULED ON THE ISSUE OF TRANSPORTING A DETAINEE WITHOUT CONSENT, SO IT IS HIGHLY RECOMMENDED THAT THE POLICE OBTAIN CONSENT FROM THE DETAINEE OR TRANSPORT THE WITNESS TO THE PLACE WHERE THE SUSPECT HAS BEEN DETAINED INSTEAD FOR A DRIVE-BY IDENTIFICATION. The officer should evaluate other options as well and select the least intrusive option (i.e. - is a photographic lineup feasible?)

\*The VT Supreme Court has ruled that drive-by identification is inherently suggestive. As a result, there are five rules officers should follow to minimize the suggestibility of the drive-by. See the criminal law manual for the rules.

The Vermont courts have ruled that drive-by identifications are inherently suggestive. As a result, the Vermont Supreme Court in State v. Unwin, (139 Vt. 186 (1980)) has outlined five factors that should be considered when evaluating the reliability of such an identification. *Note: It is very important to keep these factors in mind and to document them when using drive-by identifications so that they can withstand later challenges in court.*

1. Opportunity of the witness to view the criminal act at the time of the crime (*i.e. vantage point, duration of observation, lighting, etc.*).
2. The witness's degree of attention at the time (*i.e. focused on event or noticed the event in passing*).
3. The accuracy of any description of the criminal (*i.e. does the witness description of the suspect match the person detained*).
4. The degree of certainty shown by the witness at time of the drive-by observation (*i.e. did the witness yell "that's the guy!!" or say "well, he kind of looks like the guy, sort of ..."*).
5. The length of time between the crime and the drive-by observation. If a lengthy amount of time elapses between the crime and the detention of a suspect, consider choosing an alternate identification method.

#### Sequential Versus Jacket Photo Line Ups

Sequential line ups are a series of photographs shown one at a time to an eyewitness for potential identification. The law enforcement officer is not to comment while the photos are displayed and best practices suggest that a "blind administrator" should conduct the line up. A blind administrator is an officer who

has nothing to do with the case and therefore presumably will not have any unconscious body language exhibited while showing the pictures which could influence a witness. The Innocence Project recommends sequential line ups as preferable to jacket arrays *if* a blind administrator conducts the array. If there is no blind administrator available, then a photo array should be employed as it would be more reliable. Thus, the Committee recommends that where at all possible, law enforcement agencies should employ sequential photo line ups with a blind administrator. Given that Vermont has very small agencies and a blind administrator may not be available, the next best practice is to use a photo jacket that contains 5-6 photographs. In either event, the photos should be of people with similar features to those identified by the eyewitness. In no event should the suspect be made to stand out in the array or be inherently suggestive.

### Live Line Ups

Live line ups are employed by law enforcement in Vermont are rare. If a live line up is used as an investigatory tool, the following procedures, recommended by the U.S. Department of Justice should be employed:

“In composing a live lineup, the investigator should:

1. Include only one suspect in each identification procedure.
2. Select fillers who generally fit the witness’ description of the perpetrator. When there is a limited/inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.
3. Consider placing suspects in different positions in each lineup, both across cases and with multiple witnesses in the same case. Position the suspect randomly unless, where local practice allows, the suspect or the suspect’s attorney requests a particular position.
4. Include a *minimum* of four fillers (nonsuspects) per identification procedure.
5. When showing a new suspect, avoid reusing fillers in lineups shown to the same witness.”

Eyewitness evidence: A Guide for Law Enforcement, USDOJ, October 1999